Supreme Court, U.S.
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No

IN THE

Supreme Court of the United States

WILLIAM LUTHER STEWART,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari from the United States Court of Appeals for the Fourth Circuit

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Pro se Petitioner

December 11, 2006

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The Fifth Amendment to the United States Constitution: No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time or War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Fourteenth Amendment to the United States Constitution:

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

JURISDICTIONAL STATEMENT

The district court entered judgment in this case on April 29, 2005, The Fourth Circuit denied Petitioner's appeal on June 16, 2006, and Petitioner's Motion for Rehearing was denied on July 11, 2006. The Court has jurisdiction to entertain this appeal pursuant to Article III, Section 2 of the U.S. Constitution and 28 U.S.C. Section 1254.

CONCISE STATEMENT OF THE CASE

Petitioner is an individual with a high school education and training obtained through the U.S. Navy, who invented a technology to enable the transmission of broadband signals, such as telephone, television, and internet, over electric power lines ("BPL"). Blair is a successful experienced businessman. Tr. 486-488. In the late 1990's, Petitioner and Blair formed a company named Media Fusion Corp. to patent and develop Petitioner's technology. Petitioner was the Chairman of the Board and Chief Scientist, and Blair was President and CEO and handled the business side. It has been widely reported that BPL is a promising technology which is currently being rolled out by numerous utilities and other companies.

This case involves allegations that Petitioner and Blair committed wire fraud and money laundering in securing a loan from Scana Corporation for $1 million to develop and deploy BPL technology. Petitioner and Blair were jointly indicted on numerous counts of money laundering and wire fraud, but the money laundering counts were all dismissed before trial. They were then tried together on six identical counts of wire fraud, the only differences in the counts being that each count was based on a separate wire transmission. (Appendix p. 35) Blair was acquitted on all counts, and

Petitioner was acquitted on five counts but was convicted on a single count, alleging transmission of a fax containing monthly milestones and budget for Media Fusion on or about March 5, 1999. (Appendix p. 33) Thus, not only were all the allegations of money laundering dismissed, but the jury acquitted the two Defendants on a total of eleven of the twelve overlapping counts of wire fraud which remained, leaving a single count for this appeal.

Petitioner appealed his conviction on the one count based on several grounds including sufficiency of evidence. (Appendix p. 37) In its June 16, 2006 decision, the Fourth Circuit affirmed the conviction, stating that, "Even though the fax was sent by Blair, the jury could reasonably have believed that Stewart directed Blair to send the fax or that he assisted Blair in doing so. Stewart and Blair were the two principals of Media Fusion and were constant companions in obtaining the loan from Scana." (Appendix p. 63) Therefore, even though it is uncontested that Blair sent the subject fax and was acquitted on all charges, Petitioner was convicted on the basis of the same fax.

Petitioner acknowledges that he and Blair were principals in Media Fusion. However, contrary to the Fourth Circuit's determination, the record does not establish beyond a reasonable doubt that Petitioner and Blair "were constant companions in obtaining the loan from Scana." Therefore, one of the two factual predicates for the inference drawn by the Fourth Circuit in support of Petitioner's conviction is wrong.

Bob Long ("Long") was the General Manager of Corporate Planning for Scana, was generally in charge of evaluating business opportunities for Scana, and testified at trial as a Government witness. Tr. 365, 413-414. Long testified that he was the "lead facilitator person" for Scana's dealings with Media Fusion and was the "point man" for Scana from the business side. Tr. 488-489 and 522. Long

also testified that he didn't talk to Mr. Stewart a lot and may have done so as few as three times. Tr. 503. In contrast, Long testified that he separately communicated with Blair many times regarding the transaction. Tr. 380-2, 396, 406-407, 427-428, 436, 488-489, 494, and 522. Long's separate communications with Blair addressed such things as costs, budget, and profitability, which were the subject of the March 5 fax. Tr. 372, 427- 428. No evidence was adduced at trial that Stewart participated in these additional communications focusing on the business aspects of the transaction.

Further, the evidence at trial was that the March 5, 1999 fax was from Blair to Long. Tr. 370-1, 414-5. Long testified specifically:

Q: All right. And you requested Government's 6 as a result of that?
A: I, in conversation with Ed Blair, I had asked do you have a business plan, how the money will be spent, and how the commercialization of the product will take place.

Q: And that's when you got Government's 6?

A: That's correct.

Tr. 371-2. Thus, Long testified that he directly asked Blair to provide him with the budget and milestones, and Blair did so. Therefore, Long's testimony is squarely inconsistent with the notion that Petitioner "directed Blair to send the fax or that he assisted Blair in doing so." There is no indication in the record that Petitioner even knew of Long's request for this data, or that he had any reason to anticipate that Blair would be furnishing this data to Scana at all or specifically by wire. Instead, Long's testimony that he dealt with Blair, not Petitioner, regarding the business side of the transaction confirms that Blair sent the fax on his own[1].

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[1] The Government presented evidence and testimony from Petitioner and Blair at trial through an FBI investigator with whom they both voluntarily

It is not reasonable to draw the evidentiary inference beyond a reasonable doubt that Petitioner directed or assisted in the fax based merely on the fact that he and Blair were principals in Media Fusion in light of Long's unimpeached testimony that Long specifically asked Blair for a business plan and that Blair sent it to him.[2]

It necessarily follows that it is mere conjecture and speculation that Petitioner directed Blair to send the fax or assisted him in doing it. Consequently, the Fourth Circuit's decision affirming Stewart's conviction is contrary to decisions by the Third, Fifth, and Seventh Circuits that an inference can be relied upon "when no direct evidence is available so long as there exists a logical and convincing connection between the facts established and the conclusion inferred." *U. S. v. McNeill,* 887 F.2d 448 (3rd Cir. 1989); *Fenner v. General Motors Corp.*, 567 F.2d 647 (5th Cir. 1981) ("An inference may be unreasonable if it is 'at war with uncontradicted or unimpeached facts'"); *NLRB v. Kaye*, 272 F.2d 112 (7th Cir. 1959) ("It has been held, and we think properly, that inferences contrary to direct testimony are not ordinarily sufficient to support a finding"); see also *Hammerly Oaks v. Edwards*, 958 S.W.2d 387 (Tex. 1997). It is even more egregious here than in some of the civil cases cited above, because in a criminal proceeding, the

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consented to be interviewed, and by reading portions of lengthy depositions that Scana had taken of them in civil proceedings. Further, three additional officials of Media Fusion who were involved in raising money for the company, including one of whom directly met with Scana, testified as Government witnesses at trial—Admiral James Carey, Jesse Hanger, and Kate Scoggins Travis. Therefore, although the Government had access to the relevant facts, it failed to present any testimony that Stewart participated in sending the March 5 fax to Long or anticipated that it would be transmitted by wire, or even regarding Media Fusion's normal business practices concerning the use of facsimiles, giving rise to a negative inference regarding Petitioner's involvement with the fax.

[2] Here, Blair was acquitted on the same count of wire fraud, even though it is uncontested that he sent out the fax at issue.

government must prove its allegations beyond a reasonable doubt instead of merely by a preponderance of the evidence.

The inference must be reasonably drawn from, and supported by, the facts on which it purports to rest. The reasonableness of an inference is largely determined by the nature of the underlying facts upon which the inference is premised. A reasonable inference is a rational and logical conclusion drawn from established facts when those facts are viewed in the light of common knowledge or experience. An inference must be made in accordance with correct and common modes of reasoning, and, according to some decisions must be strong and almost inevitable, although it is not required that an inference be justified beyond all doubt. 32A Corpus Juris Secundum, Section 1341 at 764, citing *U.S. v. Carroll*, 212 F. Supp. 422 (D.C. Ark.)

The Supreme Court should grant cert in order to resolve this important matter on which the Federal Circuit Courts of Appeal are divided. *Rules of the Supreme Court of the United States, Rule 10.*

Further, Petitioner respectfully submits that the Court should grant cert, because Petitioner has been sentenced to jail based on a finding made by the district court instead of by the jury, which the district court has acknowledged is inconsistent with the verdict, because this result is contrary to this Court's decision in *Cunningham v. California,* 549 U.S. __ (2007) and *U.S. v. Booker*, 543 U.S. 220 (2005). Petitioner is not an attorney and very recently became aware of this precedent as the result of press reports regarding *Cunningham,* which was decided on January 22, 2007, and he is promptly presenting this case to the Court.

Injury or loss is not an element of criminal mail fraud. Petitioner was convicted on Count one but was acquitted on the remainder of the counts, including specifically Counts five and six. [See Jury Verdict in the Appendix, page 35.] The Government did not allege any loss as part of Count

one, but it did allege $1 million dollars of injury or loss in Counts five and six. [See Jury Verdict in the Appendix, page 35 and the superceding indictment in the Appendix pages 24-32, 33 and 34.] Thus, the jury verdict convicting Petitioner on Count one did not include any finding that Petitioner's conduct resulted in any injury or loss, and to the contrary, the jury determined that Petitioner did not cause any loss by acquitting him on Counts five and six. [See Superceding Indictment in Appendix, pages 24 through 32 and 33 and 34.]

A critical issue at Petitioner's sentencing hearing was whether Scana was a "victim" of the mail fraud and whether it suffered any loss, because this would result in an "eleven point enhancement" under the Federal Sentencing Guidelines. Both the district court and the Government openly acknowledged during the sentencing hearing that it was "troubling" for the district court to make the finding of a million dollar loss, justifying the eleven point enhancement, because this had been rejected by the jury:

THE COURT: Mr. Eichelberger, I think that this issue in objection eight about the 11 point enhancement for the million dollars is troubling because of the jury verdict in count five.

MR. EICHELBERGER: It is.

THE COURT: And, you know, we have been through all of this Booker and Fanfair issue. This was presented to the jury.

MR. EICHELBERGER: It was.

THE COURT: And they rejected it, in a sense. In count five at least.... Tr. 1273-1274.

Even though the district court recognized that the jury had rejected the allegation that Petitioner's actions resulted in a loss, the district court ultimately went on to find that Scana was a victim and its loss was $1 million based on the district court's assessment of the evidence:

THE COURT: All right. Well, it's a hard issue. I think that I have to go with my assessment of the evidence was, and my assessment of the evidence was that SCANA would not have loaned the $1 million had these false representations not been made or had they known the falsity of those false representations. Therefore, I find that SCANA is a victim under paragraph 20, and I also find that the amount of loss was $1 million. Tr. 1278-1279.

The district court then sentenced Petitioner to thirty months imprisonment based on the eleven point enhancement, acknowledging that whether the enhancement properly applied was a critical issue which needed to be decided on appeal before Petitioner was required to serve any time:

THE COURT: ... Then the Court adopts the factual statements contained in the presentence report as revised on the record. We have a total offense level of 19, a criminal history category of one, a guideline range of 30 to 37 months imprisonment, a supervised release range of two to three years, a special assessment of $100.

Mr. Griffin, it would be my proposal that I would give the minimum sentence. I would also in this case be willing to stay execution of the sentence pending appeal because of these difficult issues.

MR. GRIFFIN: Thank you, your honor.

THE COURT: Because if I had ruled otherwise on that 11 point enhancement it could have made the difference between incarceration or not. And I don't think you can get an appellate decision in time to prevent him from serving time if he is not due to serve the time, if I am wrong on that enhancement. Tr. 1286-1287 (emphasis added.)

Thus, the district court openly acknowledged that Petitioner would not have been sentenced to prison if the eleven point enhancement did not properly apply, and it was concerned enough about this "troubling" issue to stay execution of Petitioner's sentence pending appeal.

On appeal, the Fourth Circuit specifically and significantly stated that it was permissible for the district court to determine whether Petitioner's conduct caused a loss based on a preponderance of the evidence and then considered whether there was sufficient evidence to support the finding of a million dollar loss, but it did not address whether a jury finding justified the sentence imposed, nor did it address the acknowledged inconsistency between the verdict on Count 5 and the district court's finding on the eleven point enhancement. These are fatal flaws.

Petitioner's sentence needs to be reversed in accordance with *Cunningham and Booker*:

> The facts so found are neither inherent in the jury's verdict nor embraced by the defendant's plea, and they need only be established by a preponderance of the evidence, not beyond a reasonable doubt. The question presented is whether the DSL, by placing sentence-elevating fact finding within the judge's province, violates a defendant's right to trial by jury safeguarded by the Sixth and Fourteenth Amendments. We hold that it does.

> For reasons explained in *Jones, Apprendi,* and *Ring*, the requirements of the Sixth Amendment were clear. The application of Washington's sentencing scheme violated the defendant's right to have the jury find the existence of 'any particular fact'" that the law makes essential to his punishment. 542 U.S. at 301. That right is implicated whenever a judge seeks to impose a sentence that is not solely based on "facts reflected in the jury verdict or admitted by the defendant."

549 U.S. __ (2007); 543 U.S. at 232 (emphasis added.) In this case Petitioner was sentenced to prison based on the district court's determination of a million dollar loss, which was not only not found by the jury or admitted by the defendant, but which the district court openly acknowledged was inconsistent with the verdict on Count 5. The district court made this finding based on the preponderance of the evidence rather than proof beyond a reasonable doubt, and the Fourth Circuit expressly affirmed it on that basis. Even though the Federal Sentencing Guidelines are no longer mandatory as the result of *Booker*, in this case the district court clearly indicated that Petitioner would not have been sentenced to incarceration unless it properly determined that the eleven point enhancement applied ("And I don't think you can get an appellate decision in time to prevent him from serving the time if he is not due to serve the time, if I'm wrong on that enhancement.") Tr. 1287.

Consequently, because the jury did not find the facts justifying the enhancement supporting Petitioner's incarceration and those facts were not admitted by defendant's plea, the district court's sentencing decision based on its finding of a million dollar loss by the preponderance of the evidence was erroneous. Accordingly, unless appeals of federal sentences can now only occur in "Wonderland," as Justice Scalia asserted in his dissent in

Booker, Petitioner's sentence should be reversed under the reasonableness standard articulated by the majority opinion in that case. 543 U.S. 261-263. If the basis that the district court expressly articulated for its sentence is erroneous, the sentence is necessarily unreasonable and should be reversed.

SUMMARY OF ARGUMENT

Petitioner was found guilty of criminal conduct that the evidence at issue in this appeal, the appellate court, and the transcript unequivocally and uncontrovertibly prove beyond any doubt that Petitioner did not engage in the criminal conduct Petitioner was accused of.

To be specific, the Petitioner was acquitted, by the trial jury, of the very same conduct that is the subject of this appeal. The Defendant in District Court, through his Attorney, testified that Petitioner did not commit the crime herein on appeal. No evidence exits to support the verdict and no jury instructions by the District Court clearly identified this discrepancy. Therefore, the jury did not have proper instruction; which Petitioner's Counsel did not recognize until the conflicting verdict was read.

Petitioner's Counsel raised the inconsistency of the verdict and, the issue of the true and correct facts that were before the jury as grounds for dismissal and the District Court, upon the objections of the U.S. Government, sustained the verdict and admitted that by doing so error may have been committed. Subsequently, the Petitioner was released, on his on recognizance, to pursue his appellate rights.

The District Court offered no other remedy to this decision and, further, opted to validate a jury verdict without evidence. In addition, on appeal the Circuit court relaxed the standard of the criminal burden of proof with a lesser standard of civil burden of proof.

Petitioner was found guilty[3] on the very facts upon which both he and an alleged co-conspirator and co-defendant were both found not guilty on the same charge by the same jury.

This verdict is wrongfully based. The Petitioner was found guilty of one count of wire fraud general that incorporated by reference counts for which petitioner was acquitted, plus one count that on which there was direct uncontroversial evidence at trial that the petitioner did not commit the criminal conduct and as Vice President had no authority to direct codefendant to commit such conduct and the jury acquitted both defendants of committing such criminal conduct.

Specifically, Petitioner was found guilty of wire fraud because another person sent a fax that was requested and was then alleged by the U.S. Government to mislead the recipient on the timing and state of the development of this advanced technology. However, examination of the "material facts" set out in the controversial fax from "Media Fusion" stated the technical success and deployment was all premised on adequate funding. This fact is extremely important because the recipient tried to prevent this technical effort from occurring and may have tried to secure the technology via unfair business practice.

Coincidentally, this same claimant is now seeking ownership of the technology, which it slandered continually and aided the U.S. Government's prosecution in the trial where the U.S. Government accused the Petitioner of criminal statutes. This raises the question of whether or not the U.S. Government is complicit in this trial. Or more specifically, did the U.S. Government, or its agents, gain in taking an action to curtail or terminate any communications technology that is challenging to the current U.S. electrical and communications infrastructure?

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[3] Petitioner found guilty of wire fraud in violation of 18 U.S.C. § 1343 and 2.

ARGUMENT

I. THERE IS A COMPELLING NEED TO REVERSE THE FOURTH CIRCUIT DECISION IGNORING THE NATURE AND SUFFICENCY OF EVIDENCE IN TRIAL TC SUSTAIN DISTRICT COURT DECISION WHERE THE ACTION IS INCONSISTENT WITH DUE PROCESS RIGHTS AND CONSTITUTIONAL LAW

At this critical time in our history where many citizens question whether or not our civil rights are being compromised we cannot afford to allow our Federal Courts and Circuits to disregard Due Process Rights and Constitutional Law.

In re Winship, 397 U.S. 358, 364 (1970), the Supreme Court explicitly held that the Due Process Clause requires the government to prove every element of a charged offense beyond a reasonable doubt. "[S]o long as the court instructs the jury on the necessity that the defendant's guilt be proved beyond a reasonable doubt, the Constitution does not require that any particular form of words be used in advising the jury of the government's burden of proof." Victor, 511 U.S. at 5.

"When any trial court is allowed to ignore the nature of evidence or any appellate court is allowed to ignore the nature of any evidence or criminal procedure that is not permitted by the "Good Law of the Land". They have acted grossly negligent and committed errors that must be reversed. If not reversed there is inconsistency between the application of the "rule of law" as promulgated by the U.S. Constitution, the U.S. Congress, The U.S. Supreme Court

and the entire judicial system of the United States of America and the rights provided to citizens under the U.S. Constitution and its Amendments.

There is no sufficient remedy to this occurrence other than a reversal of opinion. The Fourth Circuit committed a reversible error in applying a civil burden of proof standard of "substantial evidence" in a criminal trial." *In re* Winship, 397 U.S. 358, 364 (1970)"

After *Winship* the critical inquiry on review of the sufficiency of the evidence to support a criminal conviction must be not simply to determine whether the jury was properly instructed, but to determine whether the record evidence could reasonably support a finding of guilt beyond a reasonable doubt. But this inquiry does not require a court to "ask itself whether *it* believes that the evidence at the trial established guilt beyond a reasonable doubt." *Woodby* v. *INS*, 385 U.S., at 282 (emphasis added). Instead, the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. See *Johnson* v. *Louisiana*, 406 U.S., at 362. This familiar standard gives full play to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts. Once a defendant has been found guilty of the crime charged, the fact finder's role as weigher of the evidence is preserved through a legal conclusion that upon judicial review *all of the evidence* is to be considered in the light most favorable to the prosecution. The criterion thus impinges upon "jury" discretion only to the extent necessary to guarantee the fundamental protection of due process of law.

It is clear that there was no evidence in the trial record that provided for the Petitioner's guilt. In addition the Fourth Circuit admitted that Defendant Blair "sent the fax that is in question". Further, Defendant Blair was acquitted

of this charge showing there was no criminal act. It is difficult for the Petitioner to comprehend how a guilty verdict can be sustained in this manner when the evidence does not support Petitioner committing this act. The evidence is to the contrary. Certainly the Fourth Circuit erred in their review in relaxing the standard of proof.

There is no legal precedent that provides for such a change of standard of proof in the U.S. Criminal Code of Justice or in the Appellate process of the U.S. Criminal Code of Justice. The Circuit Courts should not be inconsistent. Inconsistency leads to "unbridled inferences" to the meaning of the law and rejects "stare decisis".

While there may be an occurrence that may require a decision "ratio decidendi" because the cases of precedent seem to be obscure, or out of accord with authority or established principle; it is irrational to assume that the body of law, including criminal law, is not established principle under the U.S. Constitution and the law of the land. Mr. Justice BRENNAN continued in the *Winship* opinion…that '(g)uilt in a criminal case must be proved beyond a reasonable doubt and by evidence confined to that which long experience in the common-law tradition, to some extent embodied in the Constitution, has crystallized into rules of evidence consistent with that standard. These rules are historically grounded rights of our system, developed to safeguard men from dubious and unjust convictions, with resulting forfeitures of life, liberty and property.' *Davis v. United States*, supra, 160 U.S., at 488 stated that the requirement is implicit in 'constitutions ... (which) recognize the fundamental principles that are deemed essential for the protection of life and liberty.' *In re* Winship, 397 U.S. 358, 364 (1970)

In Davis a murder conviction was [397 U.S. 358, 363] reversed because the trial judge instructed the jury that it was their duty to convict when the evidence was equally

balanced regarding the sanity of the accused. This Court said: 'On the contrary, he is entitled to an acquittal of the specific crime charged, if upon all the evidence, there is reasonable doubt whether he was capable in law of committing crime. ... No man should be deprived of his life under the forms of law unless the jurors who try him are able, upon their consciences, to say that the evidence before them ... is sufficient to show beyond a reasonable doubt the existence of every fact necessary to constitute the crime charged.' Id., at 484, 493, 360.

II CERTIORARI IS WARRANTED TO REEXAMINE THE FOURTH CIRCUIT'S UNPRECEDENTED ADAPTATION OF THE CRIMINAL CODE AND IT'S INTREPRETATION

A. The Decision Below Violates Both the Origin and Purpose of the Due Process Rights as Set Forth and Guaranteed in the U.S. Constitution.

In *Thomson v The City of Lewisville et al,* the U.S. Supreme Court held that an examination of the record presented in the petition for certiorari showed that although the fines imposed were small, the due process questions presented were substantial. The court held that under the words of the ordinance, if the evidence failed to prove all three elements of the loitering charge, the conviction was not supported by evidence, in which event it did not comport with due process of law. The court held that there was no evidence at all in the record to support the convictions. Further, the court held that just as conviction upon a charge not made would have been sheer denial of due process, so to it was a violation of due process to convict and punish petitioner without evidence of his guilt.

"Accordingly, a society [397 U.S. 358, 364] that values the good name and freedom of every individual should not condemn a man for commission of a crime when there is reasonable doubt about his guilt. Due process commands that no man shall lose his liberty unless the Government has borne the burden of ... convincing the fact finder of his guilt.' To this end, the reasonable-doubt standard is indispensable, for it 'impresses on the trier of fact the necessity of reaching a subjective state of certitude of the facts in issue.' Dorsen & Rezneck, In Re Gault and the Future of Juvenile Law, 1 Family Law Quarterly, No. 4, pp. 1, 26 (1967)."

Moreover, use of the reasonable-doubt standard is indispensable to command the respect and confidence of the community in applications of the criminal law. It is critical that the moral force of the criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned. It is also important in our free society that every individual going about his ordinary affairs have confidence that his government cannot adjudge him guilty of a criminal offense without convincing a proper fact finder of his guilt with utmost certainty.

Lest there remain any doubt about the constitutional stature of the reasonable-doubt standard, we explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." [397 U.S. 358, 365]

II

Finally, we reject the Court of Appeals' suggestion that there is, in any event, only a 'tenuous difference'

between the reasonable-doubt and preponderance standards. The suggestion is singularly unpersuasive. In this very case, the trial judge's ability to distinguish between the two standards enabled her to make a finding of guilt that she conceded she might not have made under the standard of proof beyond a reasonable doubt. Indeed, the trial judge's action evidences the accuracy of the observation of commentators that 'the preponderance test is susceptible to the misinter- [397 U.S. 358, 368] pretation that it calls on the trier of fact merely to perform an abstract weighing of the evidence in order to determine which side has produced the greater quantum, without regard to its effect in convincing his mind of the truth of the proposition asserted.' Dorsen & Rezneck, supra, at 26-27.6.

B. The Fourth Circuit's Decision is at Odds With the Court's Functional Approach to the Procedures of Criminal Law.

Further stated in the *Winship Doctrine* are the expressions in many opinions of the U.S. Supreme Court indicate that it has long been assumed that proof of a criminal charge beyond a reasonable doubt is constitutionally required. See, for example, *Miles v. United States*, 103 U.S. 304, 312 (1881); *Davis v. United States*, 160 U.S. 469, 488, 358 (1895); *Holt v. United States*, 218 U.S. 245, 253 , 6 (1910); *Wilson v. United States*, 232 U.S. 563, 569 -570, 349, 350 (1914); *Brinegar v. United States*, 338 U.S. 160, 174 , 1310 (1949); *Leland v. Oregon*, 343 U.S. 790, 795 , 1005, 1006 (1952); *Holland v. United States*, 348 U.S. 121, 138 , 136, 137 (1954); *Speiser v. Randall*, 357 U.S. 513 , 525-526, 1342 (1958). *Cf. Coffin v. United States*, 156 U.S. 432 (1895).

The confidence in our nations law and legal procedures regarding Due Process and Constitutional Rights

are the basis for our belief that all in our nation is afforded equal justice under the law. Therefore, any action taken by the American judicial system should exhaust every effort to protect citizen's rights and there by protect our nation.

Prosecutors, whether they are U.S. Attorneys or otherwise should uphold these standards or the legal system itself with fail the people. Judges must use their power to preserve the rights and procedures at trials. In the case where life, liberty, fortune and citizenship are at risk, the necessity of Prosecutors, Defenders and Judges that participate in this process must first, and most importantly, maintain a defendant's rights to a fair trial. A fair trial is the constitutional right of every American citizen.

The Fourth Circuit[4] failed the people of the United States and the Petitioner by drawing a conclusion to an allegation as fact by "belief and inference". In so doing they violated the 5th and 14th Amendments of our U.S. Constitution and failed to apply proper legal standards of review. Further, in spite of clear evidence in the trial transcript contrary to their decision[4] they chose to admit the lack of evidence against Petitioner and proceed with inferring that "the jury could reasonably have believed" that "Petitioner directed defendant Blair to commit a crime[5]" or in the alternative; that Petitioner "assisted defendant Blair in committing a crime". There is no evidence in the trial transcript or otherwise to assume or believe that Petitioner had the power, right, or other control over defendant Blair to direct his actions.

In fact, the trial evidence indicated that defendant Blair was the President of the company and therefore responsible and controlled all actions of the company to which it may have been bound and he himself was acquitted of this specific fact of the specific count. Still further, the

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[4] Fourth Circuit Opinion, June 16th, 2006, § I

[5] An action that Defendant Blair was acquitted of at trial.

Fourth Circuit admitted: "Even though the fax was sent by Blair…" an admission that further corroborates Petitioner's innocence; the Fourth Circuit seems to ignore the necessity of the rule of sufficiency of evidence in a criminal trial or appeal in their appellate review and subsequent decision.

The Fourth Circuit, in making their decision, failed to use the standards as set by Criminal Procedure and Constitutional Law that requires proof beyond a reasonable doubt to sustain a criminal conviction. An inference of guilt is not proof of guilt. Therefore, the Fourth Circuit erred in its decision and this error should be reversed for the Petitioner.

REASONS FOR GRANTING THE WRIT

Petitioner respectfully submits that the Supreme Court should grant his Petition for Writ of Certiorari, because compelling reasons to do so exist, including that the Petition raises important matters on which the United States courts of appeals, specifically the Third, Fourth, Fifth, and Seventh Circuits have entered decision in conflict, and that the Fourth Circuit has departed so far from the accepted and usual course of proceedings and has sanctioned such a departure by the district court, to warrant an exercise of this Court's supervisory power. *Rule 10.*

CONCLUSION

For the foregoing reasons, Petitioner requests the Supreme Court to accept review of this case and grant this Writ of Certiorari. This case warrants Supreme Court Review as the circuit court below erred in its decision to uphold a criminal conviction of wire fraud based on direct evidence to the contrary and facts upon which petitioner and alleged co- "Scheme to Defraud" were both acquitted.

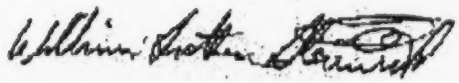
Not only did the circuit court admit in its holding that

petition did not in fact commit the act upon which the alleged wire fraud was based but erroneously used a "substantial evidence" test to infer that the jury could have reasonably believed petitioner directed another that admitted sending the fax and was acquitted of wire fraud for do so. The petitioner was acquitted of the very same wire fraud that is the subject of this petition.

The Fourth Circuit's-error in the application of a lesser standard of proof regarding the weight of evidence in trial to sustain District Court Decision where the application of a "civil standard" was used in a "criminal appeal" to sustain a conviction that fails the sufficiency-of-evidence-test, and is inconsistent with Due Process Rights and Constitutional and established Law.

The Court should also set aside Petitioner's sentence as unreasonable and unconstitutional, because it was expressly based on findings by the District Court under a preponderance of evidence standard, which is inconsistent with the Jury Verdict.

Respectfully submitted:



William Luther Stewart
pro se

December 7th, 2007

ORIGINAL
FILED
MAR 2, 2004
L. Larry Propes, Clerk
Columbia, SC

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION

UNITED STATES OF AMERICA NUMBER 3.03-1088	) CRIMINAL
	) 18 U.S. C. § 1343
	) 18 U.S. C. § 11950(h)
v.	) 18 U.S. C. § 2
	)
WILLIAM LUTHER STEWART, a/k/a Luke Stewart, and EDWIN G. BLAIR	)))

SUPERSEDING INDICTMENT

MAXIMUM SENTENCE THIS COUNT
FINE OF $250,000.00 (18 U.S. C. § 3571)
AND/OR IMPRISONMENT FOR 5 YEARS
AND A TERM OF SUPERVISED RELEASE
OF 3 YEARS (18 U.S. C. § 3583)
SPECIAL ASSESSMENT $100.00
(18 U.S. C. § 3013)

COUNT 1

THE GRAND JURY CHARGES:

1. On or before February 1999, in the District of South Carolina and elsewhere, WILLIAM LUTHER STEWART, also know as Luke Stewart, and EDWIN G. BLAIR did devise and intend to devise a scheme and artifice to defraud and obtain money be means of false and fraudulent pretenses, representations, and promises.

BACKGROUND

2. On or about November 13, 1998 Media Fusion, Corp. was converted to Media Fusion, LLC, a Texas limited liability company. WILLIAM LUTHER STEWART was Chairman and Chief Scientist. EDWIN G. BLAIR was President.

3. On April 23, 1999, an account was opened at Compass Bank, Dallas, Texas, in the name of Media Fusion, LLC.

SCHEME TO DEFRAUD

4. It was part of the scheme to defraud that WILLIAM LUTHER STEWART and EDWIN G. BLAIR falsely represented that Media Fusion had developed a method of power line communication technology to provide voice, video, and data communications over the electric power grid.

5. It was a further part of the scheme to defraud that WILLIAM LUTHER STEWART and EDWIN G. BLAIR falsely represented that Media Fusion had completed the design and laboratory testing stages of its proprietary network system and was

well positioned to finalize the construction and installation of its first system.

6. It was a further part of the scheme to defraud that WILLIAM LUTHER STEWART and EDWIN G. BLAIR falsely represented WILLIAM LUTHER STEWARTs' background and experience with the Massachusetts Institution of Technology (MIT), the Defense Advanced Research Projects Agency (DARPA), Microsoft, and San Diego Gas and Electric.

7. It was a further part of the scheme to defraud that WILLIAM LUTHER STEWART and EDWIN G. BLAIR falsely represented WILLIAM LUTHER STEWART was a nominee for the Nobel Peace Prize.

8. It was a further part of the scheme to defraud that WILLIAM LUTHER STEWART and EDWIN G. BLAIR falsely represented that Media Fusion was associated with, and had a laboratory at the Stennis Space Center, National Aeronautics and Space Administration (NASA).

9. It was a further part of the scheme to defraud that WILLIAM LUTHER STEWART and EDWIN G. BLAIR falsely represented that money received from SCANA would be spent testing the power line communication technology. Specifically, transmitting a continuous tone over the electrical grid in excess of 500 miles without regeneration by November 30, 1999.

10. On or about March 5, 1999, in the District of South Carolina and elsewhere EDWIN G. BLAIR and WILLIAM LUTHER STEWART, for the purpose of executing the aforesaid scheme to defraud, did cause to be transmitted by means of wire in interstate commerce from Dallas, Texas, to Columbia, South Carolina, to Texas, a fax containing monthly milestones and budget for Media Fusion; in violation of Title 18, United States Code, Sections 1343 and 2.

MAXIMUM SENTENCE THIS COUNT
FINE OF $250,000.00 (18 U.S. C. § 3571)
AND/OR IMPRISONMENT FOR 5 YEARS
AND A TERM OF SUPERVISED RELEASE
OF 3 YEARS (18 U.S. C. § 3583)
SPECIAL ASSESSMENT $100.00
(18 U.S. C. § 3013)

COUNT 2

THE GRAND JURY FURTHER CHARGES:

1. The Grand Jury realleges and incorporates by reference four through nine of Count One as constituting a scheme to defraud.

2. On or about March 19, 1999, in the District of South Carolina and elsewhere, EDWIN G. BLAIR and WILLIAM LUTHER STEWART, for the purpose of executing the aforesaid scheme to defraud, did cause to be transmitted by means of wire in Interstate commerce from Dallas, Texas, to Columbia, South Carolina, a letter addressed to Jim Burwell, General manager, representing that media Fusion was "setting up our first control center at Stennis and will have offices as NASA working with the Mississippi Enterprise for Technology" with two proposals attached; In violation of Title 18, United States Code, Sections 1343 and 2.

MAXIMUM SENTENCE THIS COUNT
FINE OF $250,000.00 (18 U.S. C. § 3571)
AND/OR IMPRISONMENT FOR 5 YEARS
AND A TERM OF SUPERVISED RELEASE
OF 3 YEARS (18 U.S. C. § 3583)
SPECIAL ASSESSMENT $100.00
(18 U.S. C. § 3013)

COUNT 3

THE GRAND JURY FURTHER CHARGES:

1. The Grand Jury realleges and incorporates by reference four through nine of Count One as constituting a scheme to defraud.

2. On or about April 7, 1999, in the District of South Carolina and elsewhere, EDWIN G. BLAIR and WILLIAM LUTHER STEWART, for the purpose of executing the aforesaid scheme to defraud, did cause to be transmitted by wire in interstate commerce from Dallas, Texas, to Columbia, South Carolina, a letter addressed to Robert E. Long, General manager, representing that "based on the investment proposals submitted to SCANA, Media Fusion technology will be ready for commercialization at the end of twelve months from date of funding;" In violation of Title 18, United States Code, Sections 1343 and 2.

MAXIMUM SENTENCE THIS COUNT
FINE OF $250,000.00 (18 U.S. C. § 3571)
AND/OR IMPRISONMENT FOR 5 YEARS
AND A TERM OF SUPERVISED RELEASE
OF 3 YEARS (18 U.S. C. § 3583)
SPECIAL ASSESSMENT $100.00
(18 U.S. C. § 3013)

COUNT 4

THE GRAND JURY FURTHER CHARGES:

1. The Grand Jury realleges and incorporates by reference four through nine of Count One as constituting a scheme to defraud.

2. On or about April 23, 1999, in the District of South Carolina and elsewhere, EDWIN G. BLAIR and WILLIAM LUTHER STEWART, for the purpose of executing the aforesaid scheme to defraud, did cause to be transmitted by wire in interstate commerce from Dallas, Texas, to Columbia, South Carolina, an e-mail message identifying Media Fusion's bank and account number so money could be sent by wire; In violation of Title 18, United States Code, Sections 1343 and 2.

MAXIMUM SENTENCE THIS COUNT
FINE OF $250,000.00 (18 U.S. C. § 3571)
AND/OR IMPRISONMENT FOR 5 YEARS
AND A TERM OF SUPERVISED RELEASE
OF 3 YEARS (18 U.S. C. § 3583)
SPECIAL ASSESSMENT $100.00
(18 U.S. C. § 3013)

COUNT 5

THE GRAND JURY FURTHER CHARGES:

1. The Grand Jury realleges and incorporates by reference four through nine of Count One as constituting a scheme to defraud.

2. On or about April 26, 1999, in the District of South Carolina and elsewhere, EDWIN G. BLAIR and WILLIAM LUTHER STEWART, for the purpose of executing the aforesaid scheme to defraud, did cause to be transmitted by wire in interstate commerce from Columbia, South Carolina, to Texas $1,000,000.00;
In violation of Title 18, United States Code, Sections 1343 and 2.

MAXIMUM SENTENCE THIS COUNT
FINE OF $250,000.00 (18 U.S. C. § 3571)
AND/OR IMPRISONMENT FOR 5 YEARS
AND A TERM OF SUPERVISED RELEASE
OF 3 YEARS (18 U.S. C. § 3583)
SPECIAL ASSESSMENT $100.00
(18 U.S. C. § 3013)

COUNT 6

THE GRAND JURY FURTHER CHARGES:

1. The Grand Jury realleges and incorporates by reference four through nine of Count One as constituting a scheme to defraud.

2. On or about June 27, 1999, in the District of South Carolina and elsewhere, EDWIN G. BLAIR and WILLIAM LUTHER STEWART, for the purpose of executing the aforesaid scheme to defraud, did cause to be transmitted by wire in interstate commerce from Dallas, Texas, to Columbia, South Carolina, an e-mail message asking for an additional $1,000,000.00 before July 1, 1999; In violation of Title 18, United States Code, Sections 1343 and 2.

MAXIMUM SENTENCE THIS COUNT
FINE OF $250,000.00 (18 U.S. C. § 3571)
AND/OR IMPRISONMENT FOR 5 YEARS
AND A TERM OF SUPERVISED RELEASE
OF 3 YEARS (18 U.S. C. § 3583)
SPECIAL ASSESSMENT $100.00
(18 U.S. C. § 3013)

COUNT 7

THE GRAND JURY FURTHER CHARGES:

1. From on or about April 28, 1999, though on or about July 30, 1999, in the District of South Carolina and elsewhere, WILLIAM LUTHER STEWART, and EDWIN G. BLAIR unlawfully, knowingly, and willfully did conspire to conduct and attempt to conduct a financial transaction effecting interstate commerce which involved the proceeds of some form of specified unlawful activity, that is, wire fraud in violation of Title 18, United States Code, Section 1343, with the intent to promote the carrying on of the specified unlawful activity; In violation of Title 18, United States Code, Section 1956(h).

A True BILL

s/Marie W. Carter
FOREMAN

S/ J. Strom Thurmond, Jr.
J. STROM THURMOND, JR. (EWR)
UNITED STATES ATTORNEY

COUNT 7, DROPPED AT TRIAL.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION

UNITED STATES OF AMERICA	)	CRIMINAL NO.
	)	3:03-1088
v.	)	
	)	
	)	VERDICT
WILLIAM LUTHER STEWART, a/k/a Luke Stewart	)	
	)	
DEFENDANT.	)	FEB && 2005
	)	LARRY W. PROPES
		CLERK COLUMBIA, SC

1. As to Count 1, we, the jury, unanimously find Defendant William Luther Stewart

_____ Not Guilty

___x__Guilty

2. As to Count 2, we, the jury, unanimously find Defendant William Luther Stewart

___x__ Not Guilty

_____ Guilty

3. As to Count 3, we, the jury, unanimously find Defendant William Luther Stewart

___x__ Not Guilty

_____ Guilty

4. As to Count 4, we, the jury, unanimously find Defendant William Luther Stewart

___x__ Not Guilty

_____ Guilty

5. As to Count 5, we, the jury, unanimously find Defendant William Luther Stewart

___x__ Not Guilty

_____ Guilty

6. As to Count 6, we, the jury, unanimously find Defendant William Luther Stewart

___x__ Not Guilty

_____ Guilty

United States District Court

DISTRICT OF SOUTH CAROLINA

UNITED STATES OF AMERICA

JUDGMENT OF ACQUITTAL

CASE NUMBER
3:03cr1088(02)

v.

EDWIN G. BLAIR

The Defendant was found not guilty. IT IS ORDERED that the defendant is acquitted, discharged, and any bond exonerated.

s/Cameron McGowan Currie
Signature of Judicial Officer

1.

Petitioner's Appeal to the United States Court of Appeals, Fourth Circuit

JURISDICTIONAL STATEMENT

This appeal is properly before this Court pursuant to 28 U.S.C. § 1291, which gives the Court jurisdiction over appeals from criminal convictions in the United States District Courts.

STATEMENT OF THE ISSUES

I. Was there sufficient evidence from which a reasonable jury could find Defendant Stewart guilty on the charges contained in Count I alleging wire fraud

II. Did the District Court err by admitting evidence of correspondence written on behalf of NASA and the United States Attorney for the Southern District of Mississippi to a co-defendant regarding statements contained in a Web page allegedly misrepresenting a relationship between NASA and Media Fusion for the limited purpose of notice when there was no evidence that Stewart made any alleged misrepresentations after the date of the letters

III. Did the District Court err in finding that the amount of loss for purpose of calculating the Sentencing Guidelines was $1 million, when Stewart was acquitted of the count alleging wire fraud pertaining to the $1 million.

STATEMENT OF THE CASE

Stewart and a co-defendant Ed Blair were indicted on March 2, 2004, in a Superseding Indictment alleging Six Counts of wire fraud in violation of 18 U.S.C. § 1343 and One Count of Money Laundering in violation of U.S.C. § 1956(h). Prior to trial, the money laundering count was dismissed and Stewart and Blair were tried on the six wire fraud counts. The jury acquitted Ed Blair on all counts and found Stewart not guilty on Counts II through VI. The jury returned a verdict of guilty on Count I. Stewart filed a post-trial motion for judgment of acquittal under Rule 29, Fed. R. Crim. P., or in the alternative for a new trial under Rule 33, Fed. R. Crim. P. The district court denied both motions and sentenced Stewart to a term of imprisonment of 30 months. Judgment was entered on May 6, 2005 and on this same date the Clerk of Court filed a Notice of Appeal on behalf of Stewart at the direction of the district court. The District Court allowed Stewart to remain on bond pending this appeal.

STATEMENT OF THE FACTS

Appellant Luke Stewart was a shareholder and the chief scientist of Media Fusion, LLC, a Texas limited liability corporation (hereinafter "Media Fusion"). Media Fusion had an impressive cast on its board of directors, including Terry McCauliff, former Chairman of the Democratic National Committee, Bob Livingston, former Chairman of the House Ways and Means Committee and retired Rear Admiral James J. Carey. In addition, Media Fusion had also assembled a powerful cadre of lobbyists, many inside the Washington Beltway, to work with Stewart

and Blair. (JA 102, ll. 16-25 to 108, ll. 1-19; 122, ll. 7-25 to 123, ll. 1-15).

Their goal was to commercialize Stewart's patented technology that enables electrical power grids to transmit voice and data communications. Such power line communication faces a number of technical obstacles, the most significant being the interference of transformers that prevent a communication signal from being transmitted from a power grid to an individual's home or business without disturbance. The Media Fusion technology solved the typical problems with power line communications by inscribing data into the magnetic wave surrounding the electrical grid. (JA 516, ll. 522).

This advanced sub-carrier modulation technology (ASCM), as Stewart named it, is protected by a patent issued by the United States Patent Office that was ultimately obtained by Media Fusion. (JA 446, ll. 6-16; 795 to 813). Power line communication technology has been a passion for Stewart. He has spent years analyzing, developing and testing various technical approaches to solving the problems facing power line communication. Stewart conducted testing of his revolutionary approach to solving the well known problems created by transformer interference in Guatemala. (JA 580, ll. 2-25 to 582, ll. 1-16; 589, ll. 2-19). However, Stewart had never successfully integrated all components of his solution to power line communication. Stewart's solution though integrated various components that had been previously tested and proven in various applications. (JA 582, ll. 24-25 to 585, ll. 1-20).

In an effort to bring this technology to market, Stewart, Ed Blair and Stewart's former fiancé Kathryn

Scoggins Travis, met with a venture capital firm in Dallas, Texas. This firm, MG Capital, first sent Stewart to the Massachusetts Institute of Technology ("MIT") to meet with scientist to have his technology "vetted" for a determination of whether it was commercially feasible before deciding to devote its resources toward raising capital for Stewart and Blair. Following this "vetting," MG Capital representatives agreed to raise capital on behalf of Stewart and Blair's start-up company. Scoggins Travis in a collaborative effort with MG Capital representatives and Stewart and Blair prepared a Power Point presentation to be used to introduce Stewart's technology to prospective investors. (JA 586, ll. 6-25 to 588, ll. 1-20).

In addition, retired Rear Admiral Carey, who had in 1997 provided Stewart and Scoggins Travis with an entre' to an international symposium on power line communication, began a government relations effort in Washington to obtain federal funding and other support for Stewart's technology. Carey assembled a total of 17 lobbyists who assisted with this effort. (JA 102, l. 25 to 108, ll. 1-22; 113, ll. 15-25 to 116, ll. 1-20).

Jim Johnson, a former high level staff member of Senator Trent Lott of Mississippi, was one of the members of this lobbying team and worked with Media Fusion and their efforts to obtain coveted administrative and research space at NASA's Stennis Space Center, in Gulfport Mississippi. Senator Lott was instrumental in having a business incubator established at Stennis for start up companies like Media Fusion to receive technological assistance from NASA scientist. Media Fusion leased administrative office space through a corporation named

Mississippi Enterprises for Technology at the Stennis Space Center (MET). In addition, Media Fusion identified additional space for the construction of a $25 million a research laboratory (JA 108, ll. 23-25 to 109, ll. 1-12; 86, ll. 3-25 to 87, ll. 1-25). Jim Johnson, the former Lott staffer, was also a lobbyist with SCANA, a South Carolina based electric, gas and nuclear utility holding company. Johnson introduced Stewart, Blair and Admiral Carey to SCANA's government relations executives in Washington, D.C. The purpose of this initial meeting was to expose SCANA to the Media Fusion business opportunity. In this initial meeting, SCANA's Jim Burwell and George Bullwinkle met with Luke Stewart, Ed Blair and Admiral Carey. (JA 117, ll. 6-25 to 120, ll. 1-7).

At this meeting, Stewart wore the security clearance badge issued to him for access to the Stennis Space Center. (JA 141, ll. 16-21; 786). In addition, Mr. Bullwinkle claims to have received a draft document that contained the content of Media Fusion's website at either this initial meeting or at another meeting prior to SCANA loaning money to Media Fusion. This document states that Media Fusion "has completed the design, laboratory testing stages of its proprietary network system and is well positioned to finalize the construction, installation testing its first system by the end of 1999. A first generation prototype is being constructed at the John C. Stennis Space Center in Gulfport, Mississippi with the cooperation of NASA…The cost of the build-out is about 15 to 25 million." (JA 692, ll. 13-25 to 703, ll. 1-3) Bullwinkle could not recall who provided a copy of this draft content of Media Fusion's web page and specifically could not state whether Stewart in fact had given

this draft document to him. (JA 714, ll. 18-25 to 715, ll. 1-6). However, the document differed significantly from the final version that was ultimately posted on the Media Fusion web site. (JA 711-714, ll. 1-17).

After the initial meeting with Messrs. Burwell and Bullwinkle, Stewart and Blair traveled to Columbia, South Carolina and met with Bob Long, head of business development at SCANA, Burwell and Oscie Brown, who at the time was a general manager in charge of telecommunications at SCANA. (JA 300, ll. 14-25).

Again, during this meeting, Stewart wore his Stennis security badge issued to him on behalf of Media Fusion for access to the NASA Stennis Space Center. (JA 301, ll. 2-9). In addition, Blair made a comment during this meeting that Stewart "would be a Nobel peace prize winner by this discovery in the technology that he had." (JA 301, ll. 3-9).

Prior to the meeting, Long had also printed out a number of pages from the Media Fusion web page which included statements that "Media Fusion has completed the design and lab testing stages of its proprietary network system." (JA 298, ll. 9-25 to 300, ll. 1-16). The printed web page also stated that "The power grid contains line noise which degrades signals, load and balances which disrupt communications and transformers which screw up harmonics and make signals difficult to control. Media Fusion's technology overcomes these obstacles." (JA 299, ll. 18-23).

After the February 22 meeting, Blair continued to have communications with Bob Long and other representatives from SCANA regarding SCANA's interest in participating financially with Media Fusion's efforts to

commercialize its technology. As part of this process, an attorney from SCANA, Randolph Mahan, drafted and had executed a Mutual Non-Obligation and Non-Disclosure Agreement. (JA 405, ll. 17-25 to 407, ll. 1-15).

The mutual Non-Disclosure and Non-Obligation Agreement provided that either party may disclose confidential information and that any such disclosure shall not obligate Media Fusion or SCANA to pay any money or to enter into any business relationship. (JA 424, ll. 5-25 to 429, ll. 1-18). In addition, the Agreement provides "communications of any kind should not be relied upon as a basis for taking any action, foregoing any opportunity or incurring costs." (JA 426, ll. 1-6). The effective date of this Agreement was March 4, 1999. (JA 422, ll. 24-25).

Following the execution of this Agreement on March 6, 1999, Ed Blair forwarded a faxed transmission to Bob Long setting forth monthly technology milestones for Media Fusion along with a science budget. (JA 772-785). The Monthly Milestones clearly indicated that Media Fusion was seeking funding in order to begin the construction of the primary lab at the Stennis Space Center, fund government relations efforts, purchase server and switching equipment, hire senior engineers and begin construction of a control center." Id.

After receiving the Monthly Milestone and Budget information, SCANA representatives met with Luke Stewart and Ed Blair on April 15, 1999, at SCANA's headquarters in Columbia, South Carolina.

During this meeting, Stewart again wore his security clearance badge issued to him on behalf of Media Fusion by NASA security at Stennis Space Center. Stewart and Blair

met with senior management at SCANA to further explore SCANA's interest in Media Fusion.

At this meeting, Stewart and Blair presented a Power Point presentation stating that Media Fusion has "completed proprietary system design and lab testing." In addition, the Power Point presentation provides some background information on Stewart. Under this section the power point has a category called "Related Experience" and simply lists the following: Massachusetts Institute of Technology, DARPA (which is the think tank for the United States Department of Defense), Microsoft, San Diego Gas and Electric and Claritek. Other than listing this information, there is no evidence that Stewart or Blair expanded upon Stewart's related experience. (JA 32, ll. 12-25 to 34, ll. 1-10). However, in a subsequent deposition given by Stewart to SCANA attorneys in Texas, Stewart explained his connections with these entities. (JA 450-452, 458-459). Also, on or about April 12, 1999, just days prior to the meeting, order begin the construction of the primary lab at the Stennis Space Center, fund government relations efforts, purchase server and switching equipment, hire senior engineers and begin construction of a control center." Id.

SCANA received a resume of Stewart from Media Fusion which listed under the heading "Honorable Mentions" Nobel Nominee List for Medicine 1990. (JA 308, ll. 19-25).

During these initial meetings, SCANA through its point person Bob Long, was aware that the individual components of the Media Fusion technology had previously been tested but that a complete integration had never before

been proven. (JA 355, ll. 14-19). In order to prove or roll-out the Media Fusion technology, Media Fusion was seeking to raise $145 million broken down into three phases: phase one required $25 million to "prove a tone" within 180 days; phase two would require $45 million to complete a system integration with in-home testing and phase three would require $80 million to employ the technology to one million customers. (JA 357, ll. 8-20).

SCANA was unwilling to invest the total $145 million needed for the three phases of the project. However, SCANA did agree to loan Media Fusion one million dollars pursuant to an unsecured note for a period of 120 days dated April 26, 1999. (JA 315, ll. 14-25). SCANA would then conduct a due diligence science review of the technology before deciding to invest additional funds. In addition, SCANA and Media Fusion executed a letter of intent simultaneously with the note wherein SCANA agreed to raise approximately $65 million to complete phases one and two of the project if the due diligence science review was satisfactory. (JA 316-324, 322, ll. 8-21).

SCANA wired one million dollars to Media Fusion on or about April 26, 1999. Two days following the wire transfer, on April 28, 1999, Stewart and Blair met with executives from ITC Delta Com, a telecommunications company in which SCANA had a substantial investment and on whose board SCANA's chairman also served. The meeting was arranged at SCANA's request. Following the April 28 meeting with ITC Delta Com, SCANA executives internally decided to walk away or abort the Media Fusion venture, without telling Media Fusion. (JA 326, ll. 2-7; ll. 23-25, 327, ll. 1-3, ll. 15-22). However, rather than

immediately walking away from this venture SCANA purported to go forward with its "due diligence" examination of the Media Fusion technology by retaining an expert to briefly vet Stewart's technology. In addition, SCANA officials traveled to Stennis Space Center to inspect the site at Stennis.

George Bullwinkle testified that there was nothing at Stennis that raised any "red flags" as to Media Fusion's prior representations about their relationship with NASA or presence at Stennis. (JA 720 ll 13-25; 721 ll 1-5). SCANA however refused to fund the additional $24 million needed for the phase one tone test set forth in the original letter of intent. SCANA however, agreed to remain a strategic partner with Media Fusion and assist Media Fusion with in-kind contributions of services as well as government relations lobbying work in an effort to obtain additional funding for the initial tone test. (JA 788, 789).

Ultimately, Media Fusion was unable to raise the additional money required to do the tone test. When SCANA's note initially came due, SCANA renewed the note for an additional time. (JA 790). When SCANA demanded payment on the note, Stewart had been ousted from Media Fusion and Blair, Carey and others were attempting to license the ASM patent. (JA 507, ll. 23-25 to 509, ll. 1-15; 793). Media Fusion did not re-pay SCANA and SCANA sued Media Fusion and obtained a judgment in United States District Court in South Carolina. During post-judgment collection efforts, SCANA's lawyers deposed Stewart in supplemental proceedings. During this deposition, Stewart was questioned about prior statements he had made pertaining to his patented technology to transmit voice and

data over an electrical grid. In this deposition, Stewart stated that "his technology works up to the point of the transformer, and we're still working on how to grid it." (JA 461, ll. 6-11). Subsequently, Stewart was confronted by an FBI agent unannounced and asked about this deposition testimony. Stewart explained to the agent that he misspoke; that he was supposed to have been afforded an opportunity to proof the deposition and make changes but that had not occurred. Had that occurred he would have changed that statement. (JA 733, ll. 2-19). Stewart also told the agent that "the technology should work and the math and physics were sound." (JA 732, ll. 4-6).

SUMMARY OF ARGUMENT

There was insufficient evidence presented at trial from which a reasonable jury could find Stewart guilty on Count I beyond a reasonable doubt, when the jury acquitted Stewart of the remaining five counts based upon the same allegations in the Indictment. In addition, the District Court abused its discretion by admitting correspondence by NASA officials claiming that Stewart misrepresented Media Fusion's relationship with NASA. This evidence was admitted solely for the purpose of notice, yet there was no evidence that Stewart continued to make the alleged misrepresentations after receipt of the letter. Lastly, the District Court erred by finding that the loss amount for purposes of the sentencing guidelines is $1 million, when Stewart was acquitted of the $1million fraud claim.

ARGUMENTS

I. THE DISTRICT COURT ERRED IN FINDING THAT

THERE WAS SUFFICIENT EVIDENCE FROM WHICH A REASONABLE JURY COULD FIND THAT STEWART IS GUILTY BEYOND A REASONABLE DOUBT

A. Standard of Review

This Court reviews, de novo, a denial of a Rule 29 motion for judgment of acquittal. *United States v. Alerre*, 430 F.3d 681 (4 Cir.2005); *United States v. Ryan-Webster*, 353 F.3d 353, 359 (4th Cir.2003). In so doing, the Court is obliged to sustain a guilty verdict if, viewing the evidence in the light most favorable to the Government, it is supported by "substantial evidence." *United States v. Burgos*, 94 F.3d 849, 862 (4th Cir.1996) (en banc) (citing *Glasser v. United States*, 315 U.S. 60, 80, 62 S. Ct. 457, 86 L. Ed. 680 (1942)). "Substantial evidence" is "evidence that a reasonable finder of fact could accept as adequate and sufficient to support a conclusion of a defendant's guilt beyond a reasonable doubt." *Id.*

B. Argument

Count I of the Indictment, for which Stewart was convicted, referenced the fax transmission dated March 3, 1999, and transmitted from Ed Blair to Bob Long containing the Media Fusion technology Monthly Milestones and Science Budget on March 6, 1999. (JA 302, ll. 17-25 to 303, l. 1). The jury acquitted Stewart of Counts II through VI. Count II referenced a letter dated March 19, 1999, addressed to Jim Burwell representing that Media Fusion was "setting up our first control center at Stennis and we will have offices

at NASA working with the Mississippi Enterprise for Technology" with two proposals attached. Count III referenced a letter addressed to Robert E. Long, General Manager, representing that "based on the investment proposal submitted to SCANA, Media Fusion technology will be ready for commercialization at the end of 12 months from date of funding." Count IV is an e-mail message identifying Media Fusion's bank account and numbers so money could be sent by wire. Count V is the actual one million dollar wire transfer from SCANA's bank account to Media Fusion's account and Count VI references an e-mail message asking for an additional one million dollars before July 1, 1999, sent from Media Fusion to SCANA.

In order for Stewart to be found guilty of wire fraud in violation of 18 U.S.C. § 1343, the government was required to prove the following elements beyond a reasonable doubt:

- (1) A scheme to defraud;
- (2) Use of an interstate wire in furtherance of the scheme; and
- (3) A material statement or omission in furtherance of the scheme.

At trial, the government failed to present substantial evidence from which a jury could find the existence of all three elements of the wire fraud charges alleged in Count I of the Indictment beyond a reasonable doubt. A scheme to defraud includes any plan or course of action intended to deceive or cheat someone out of money or property by means of false or fraudulent pretenses, representations or promises. Furthermore, the government was required to

prove beyond a reasonable doubt that Stewart intended to defraud, that is Stewart acted knowingly and with the specific intent to deceive someone, ordinarily for the purpose of causing some financial loss to another or bringing about some financial gain to oneself at the expense of another. The evidence presented at trial established that Defendant Stewart had designed patented technology to allow the transmission of voice, data and other communications over the power line grid. The witnesses uniformly agreed that this technology was a passion of the Defendant Stewart and that his purpose was to fully develop this technology and to make it a commercial success.

At trial, the government conceded the existence of the technology, but charged that Stewart overstated the status of the development of the technology in an effort to obtain funds for further research. However, the evidence contradicted this theory. In fact, the single count that the jury returned a verdict of guilty alleged that a document entitled "Monthly Milestones and Budget for Media Fusion." was faxed from Texas to South Carolina. This document clearly establishes that significant research remained to be done.

The government also failed to prove that the wire transmission charged in Count I of the Indictment was in furtherance of the scheme to defraud that involved the specific material misrepresentations alleged in Paragraphs 4 through 9 of the Indictment. The government further failed to prove that the representations in Paragraphs 4 through 9 were both material and false.

As an initial matter, the wire transmission charged in Count I was faxed from Texas to South Carolina on March 6, 1999. The alleged representations contained in Paragraphs

6, 7 and 9 of the Indictment were made after March 6, 1999, and would therefore have been unrelated to the wire transmission charged in Count I.

Paragraph 4 of the Indictment alleges that Defendant Stewart "falsely represented that Media Fusion had developed a method of power line communication technology to provide voice, video and data communications over the electric power grid." This statement was proven to be utterly true at trial. Defendant Stewart introduced into evidence the patent that was issued by the United States Patent Office for this technology. (JA 795-812). This patented technology is for a method to transmit voice, data, and video over the power grid. In fact, no one claimed that Stewart did not develop a method of power line communication. The question raised at trial was whether this method had previously been proven to work. However, SCANA witnesses acknowledged that Stewart's power line communication solution had never been fully integrated and operated. Burwell acknowledged that Stewart stated that the technology needed to be tested on a power grid for full scale operations. Long conceded that Stewart represented that components of the technology had been tested but that the system had never been integrated. (JA 355, ll. 14-19). Again, the evidence established that the allegation of paragraph 4 was a true statement.

Paragraph 5 of the Indictment alleges that Defendant Stewart falsely represented that Media Fusion had completed the design and laboratory testing stages of its "proprietary network system" and "was well positioned to finalize the construction and installation of its first system." There was no evidence submitted at the trial that Stewart had not

completed the design and laboratory testing stages of its proprietary network system. First, the government did not produce any testimony about what the "proprietary network system" referenced in paragraph was. Government witness Kate Scoggins Travis testified that Stewart had a working computer model of a routing system. (JA 583, ll. 5-22). This was the only testimony about the existence or non-existence of a proprietary network system. Furthermore, Bob Long testified that Stewart told him that elements of the overall technology had been tested, but that the system had never been integrated. (JA 355, ll. 14-19). Therefore, the "proprietary network system" could not have been the fully integrated functioning transmission of communications over a power grid. There was simply no evidence that the representation pertaining to a proprietary network system was false. In addition, the statement that Media Fusion was "well positioned to finalize the construction and installation of its first system" was not proven to be false. In fact, George Bullwinkle admitted that Media Fusion's lack of a laboratory facility at Stennis did not raise any "red flags" following their visit to Stennis. (JA 720, ll. 13-25 to 721, ll. 15).

Paragraph 6 of the Indictment alleges that Stewart falsely represented his background and experience with MIT, DARPA, Microsoft and San Diego Gas & Electric. These references are set forth in the Power Point presentation presented to SCANA on April 15, 1999. There were no witnesses who testified that this Power Point presentation was made to anyone prior to April 15, 1999, or that the statements about Stewart's related experience were made to anyone at SCANA prior to March 6, 1999. In

addition, there was no evidence presented as to exactly what Stewart claimed his affiliation with MIT, DARPA, Microsoft and/or San Diego Gas & Electric was other than the references contained in the power point presentation. Subsequently, in Stewart's civil deposition, he explained his experience with the entities listed. (JA 450-452; 458-459). There were no witnesses who testified that Stewart contradicted the explanation given in the civil deposition at any point in time. Again, the government did not prove that these representations were false nor did the government prove that the representations were material.

Paragraph 7 of the Indictment alleges that Stewart falsely represented that he was a nominee for the Nobel Peace Prize. Stewart's resume contains a reference under "Honorable Mentions" that he was on the nominee list for the Nobel Prize in medicine. Stewart's resume was faxed to SCANA on April 12, 1999. There was no evidence presented that this resume was even prepared prior to March 6, 1999. The only SCANA witness to testify about any comments pertaining to a Nobel prize prior to March 6 was Bob Long who stated that Blair made "a comment that Luke would be a Nobel Peace Prize winner by this discovery in this technology that he had." (JA 301, ll 2-9) Clearly, this was not a statement of fact, but a prediction of a future event. Moreover, there was further evidence that Stewart traveled to Europe for the purpose of attending a meeting to be considered for the Nobel Prize. (JA 94, ll. 23-25 to 95, ll. 1-10; 508, ll. 5-13). Again, the government's burden was to prove that this representation was false and there was no evidence presented to establish such falsity or materiality.

Paragraph 8 of the Indictment charges that Stewart

falsely represented that Media Fusion was associated with, and had a laboratory at Stennis Space Center. These statements are referenced in the draft marketing document that Bullwinkle testified that obtained prior to SCANA making the loan on April 26, 1999. Bullwinkle did not, however, testify that he obtained the prior to March 6, 1999. Moreover, the only SCANA representatives that Stewart met with prior to March 6 1999, were Bullwinkle, Long and Burwell. Bullwinkle and Long visited Stennis Space Center and testified that there observations as to Media Fusions presence there matched their expectations.

Paragraph 9 of the Indictment claims that Stewart falsely represented that money received from SCANA would be spent testing the power line communication technology. This representation is derived from the April 26, 1999, letter of intent and without question postdates the March 5, 1999, facsimile transmission referenced in Count I of the Indictment. Again, the government failed to prove the falsity of this statement. As established through the overwhelming evidence at trial, the April 26, 1999, letter of intent by and between SCANA and Media Fusion stated that the money would be spent "towards" testing. Furthermore, SCANA's witnesses including George Bullwinkle testified that SCANA anticipated that the money would be used to raise additional money. (JA 721, ll. 6-10). In addition, the undisputed testimony was that "Phase I" of the project involved transmitting a continuous tone over the electrical grid in excess of 500 miles and that this would cost $25 million. Lastly, this representation was undeniably made after March 6, 1999.

In addition, the government cannot rely upon the

faxed document containing Monthly Milestones and Budget for Media Fusion referenced in Count I of the Indictment as the material false misrepresentation. The Indictment does not allege that this fax transmission itself was false. Rather, Paragraph 10 of the Indictment alleges that this fax transmission was transmitted for the purpose of executing the scheme to defraud.

Lastly, there was no evidence presented from which a jury could have found that Defendant Stewart caused the fax transmission referenced in Count I to be sent. The evidence established that Ed Blair faxed the monthly milestones and budget to Bob Long. No one testified that Luke Stewart knew of the existence of such document, created such document or caused such document to be faxed to anyone. In fact, as to the budget information, the evidence established that Ed Blair, in consultation with Stewart, prepared the budget.

Furthermore, witness Jesse Hanger testified that Ed Blair stated that he did not have "confidence" in the numbers contained in the budget. However, no one testified about Stewart's state of mind or knowledge about the budget figures or even the monthly milestone issues. (JA 480 ll 23-25 to 482 ll 1-9)

The government cannot rely upon other alleged misrepresentations that were not charged in the Indictment to support the jury's verdict on Count I. Defendant Stewart is guaranteed the right to have the charges against him presented to a Grand Jury. To uphold Stewart's conviction based upon the evidence in this record would necessarily require this Court to broaden the charges contained in the Indictment. This will amount to an impermissible variance in

violation of Stewart's constitutional rights. Because the government failed to present substantial evidence from which a reasonable jury could find Defendant Stewart guilty of charges alleged in Count I, this Court should enter judgment of acquittal.

II. THE DISTRICT COURT ABUSED ITS DISCRETION BY ADMITTING EVIDENCE OF CORRESPONDENCE WRITTEN ON BEHALF OF NASA AND THE UNITED STATES ATTORNEY FOR THE SOUTHERN DISTRICT OF MISSISSIPPI TO BLAIR

a. Standard of Review

A district court's evidentiary rulings are reviewed under the abuse of discretion standard." *United States v. Grimmond*, 137 F.3d 823, 831 (4th Cir.1998).

b. Argument

The government was allowed to introduce, over objection, a letter dated July 23, 1999 from a NASA attorney to Ed Blair complaining that Media Fusion is advertising a working relationship with NASA that does not exist. The letter references statements from a web site that are allegedly "flagrantly untrue." (JA 785 A, B). The letter states that such statements on your web site are representative of false claims that have been made by your company in its press releases and in meetings, conversations with, and materials provided to congressional offices. According to several of these offices which have contacted NASA, your vice president of Technology and Chief Scientist, William "Luke" Stewart,

had been the primary source of such statement." (JA 785 A, B) In addition, the government was allowed to introduce a letter from the United States Attorney for the South District of Mississippi to Blair stating that the "Attorney General of the United States has determined that your company is engaging in acts or practices which constitute conduce prohibited by section 310 of the National Aeronautics and Space Act by conveying the impression on your internet web sites that your business and products have some connection with or endorsement from the National Aeronautic and Space Administration (NASA) that does not in fact exist." (JA 785 C). The district court admitted these letters with a limited instruction that they could be used as evidence of notice.

Stewart objected to the introduction of these letters on three grounds. First, the letters contain references and quoted statements from a web site which does not exist nor were copies of the challenged statements saved or been produced and therefore the references to such a website in these letters violates the best evidence rule. Second, the letters were not relevant, because they were written after SCANA had made the loan to Media Fusion and there was no evidence that Stewart continued to make such representations after Media Fusion received these letters. Third, the letters should have been excluded under Fed.R.Evid. 403 because the probative value was substantially outweighed by the danger of unfair prejudice. (JA 256 ll.7-25 to 343 ll 1-19)

The best evidence rule provides that "[t]o prove the content of a writing, recording, or photograph, the original writing, recording, or photograph is required, except as

otherwise provided in these rules or by Act of Congress." Fed.R.Evid. 1002. The district court upheld Stewart's objection regarding testimony as to the contents of website under the best evidence rule, but refused to redact that language referencing the web page. Such limiting instruction was not sufficient. Further, there was no evidence establishing that the statements that were the subject of NASA's complaints to Media Fusion were ever made to or observed by SCANA. In addition, there was no evidence that Stewart continued to make statements similar to the ones complained of by NASA to SCANA or anyone else following receipt of either the July 23, 1999 or September 2, 1999 letters. As a result the letters and testimony about the letters were not relevant to notice as to any issue in the trial. Moreover, to the extent that there was any probative value, it was outweighed by the danger of unfair prejudice. See, Fed. R. Evid. 403; *Old Chief v. United States*, 519 U.S. 172, 180, 117 S. Ct. 644, 136 L.Ed.2d 574 (1997) (Unfair prejudice "speaks to the capacity of some concededly relevant evidence to lure the fact finder into declaring guilt on a ground different from proof specific to the offense charged."); *United States v. Mohr*, 318 F.3d 613, 619-20 (4th Cir.2003) (Rule 403 requires suppression of evidence that results in unfair prejudice--prejudice that damages an opponent for reasons other than its probative value). The District Court therefore abused its discretion in admitting this evidence.

□ III. THE DISTRICT COURT ERRED IN FINDING THAT THE AMOUNT OF LOSS FOR PURPOSE OF CALCULATING THE SENTENCING GUIDELINES WAS

$1 MILLION

a. Standard of Review

The District Court's interpretation of the term "loss," as used in the guidelines, is reviewed de novo; its calculation of the loss under the correct interpretation is reviewed for clear error. *United States v. Hughes*, 401 F.3d 540 (4 Cir. 2005); *United States v. Miller*, 316 F.3d 495, 498 (4th Cir.2003)

b. Argument

Stewart was given an 11 point enhancement for a loss exceeding $800,000 but less than $1.5 million under U.S.S.G. 2F1.1(b)(1)(L) because "the facts in this case reflect that, based on the defendant's fraudulent representations to SCANA Corp., they agreed to loan Media Fusion $1 million." (JA 916) Stewart objected to this enhancement on the basis that Stewart was acquitted of Count V of the Indictment which alleged the $1 million loan proceeds transfer from SCANA to Media Fusion. (JA 907). "Offense" is defined in Section 1B1 application note 1(h) as "the offense of conviction and all relevant conduct under 1B1.3." The offense of conviction in this instance is Count I. In Count I, there is no dollar amount of loss alleged. The dollar amount for which a loss is alleged is contained in Count V for which Stewart was acquitted. In addition, the $1 million cannot be applied to Stewart's sentencing guideline range under the rubric of "relevant conduct." The alleged $1 million loss was specifically charged in Count V, considered

and rejected by the jury. Furthermore, the government has not contended that any other defendant, beyond Defendant Blair who was also acquitted of Count V, defrauded SCANA of the $1 million. Therefore, the relevant conduct provision pertaining to jointly undertaken criminal activity is simply inapplicable.

Furthermore, to the extent the Court can consider conduct for which Stewart was found not guilty, the government must prove such conduct by a preponderance of evidence. Here, the government was required to prove that SCANA lost money as a result of the offense of conviction. First, SCANA prior to receiving the Monthly Milestones and Science Budget on March 6, 1999, drafted and executed a Mutual Non-Disclosure and No Obligation Agreement. This Agreement specifically provided that "communications of any kind should not be relied upon as a basis for taking any action, foregoing any opportunity or incurring costs." (JA 426, ll. 1-6). SCANA therefore could not and did not rely on the March 6, 1999, fax transmission to make the loan to Media Fusion. Second, even after SCANA's science review, visit to Stennis and full background investigation of Media Fusion and Stewart, SCANA continued to remain a "strategic partner in the investigation of this technology," according to an internal memorandum written to George Bullwinkle by Randy Mahan dated June 25, 1999. (JA 788). In addition, as of August 26, 1999, SCANA extended the payment date for the note and did not call the note due until January 26, 2000. (JA 790-794). There was no evidence that Defendant Stewart caused Media Fusion to fail to repay the loan. In fact, the evidence shows that Media Fusion raised additional capital and could have paid the note if its

management chose to do so. Stewart had been ousted by the Board of Directors by then.

In addition, the evidence established that the $1 million loaned to Media Fusion, LLC was used for legitimate business expenses, including the payment of salaries and lobbying fees received by people who were not even alleged to have been involved in an illegal scheme to defraud. Pursuant to Application Note 3(E), to Section 2B1.1, Stewart was entitled to a credit against the loss for the fair market value of services rendered by the defendant and other persons working in concert with the defendant. Clearly, substantial effort was put forth by the Media Fusion government relations firm and other Media Fusion employees in an attempt to commercialize Defendant's technology. As the evidence established, SCANA remained a "strategic" partner with Media Fusion while Media Fusion used the proceeds from the $1 million loan to further both companies' interests. If these efforts had been successful, SCANA stood to reap billions from its initial loan. The fact that these efforts failed to result in a material gain to SCANA does not mean that these services were worthless. The District Court erred by failing to give Stewart credit for the value of these efforts.

CONCLUSION

Appellant Stewart respectfully requests that his conviction be vacated and judgment of acquittal be entered as to Count I. Alternatively, Stewart request a reversal of his conviction based upon the District Court's evidentiary rulings and a remand for a new trial or for an order vacating

Stewart's sentence with instructions for re-sentencing based upon a proper application of the sentencing guidelines.

Respectfully submitted,

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Attorney for Appellant
Columbia, South Carolina February 23, 2006

CERTIFICATE OF COMPLIANCE

This Brief of Appellant has been prepared using:

Microsoft Word;

Times New Roman,

14 Point Type Space.

EXCLUSIVE of the Table of Contents, Table of Authorities, and the Certificate of Filing and Service, this Brief contains ___ pages.

I understand that a material misrepresentation can result in the Court's striking the brief and imposing sanctions. If the Court so directs, I will provide an electronic version of the Brief and/or a copy of the word or line printout.

/s/ James M. Griffin
Signature of Filing Party

CERTIFICATE OF FILING AND SERVICE

I hereby certify that on this 23rd day of February 2006, I filed with the Clerk's Office of the United States Court of Appeals for the Fourth Circuit, via hand-delivery, the required number of copies of the Brief of Appellant and Joint Appendix, and I further certify that I served, UPS Ground Transportation the required copies upon:

Dean A Eichelberger
OFFICE OF THE U.S. ATTORNEY
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Columbia, South Carolina 29201

Counsel for Appellee

The necessary filing and service upon Counsel were performed in accordance with the instructions given me by counsel in this case.

/s/
THE LEX GROUP
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Suite 1400
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Fourth Circuit Appeals Court Opinion (Unpublished)

09: *30* JUN 16, 2006 ID: US COURT OF RPF'ERLS
TEL NO: 916-2796 #48584 FRGE: 1/17

United States Court of Appeals for the Fourth Circuit

TO: James Mixon Griffin
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From: Barbara Rowe Phone 804-916-2704
Description: Number of Pages: 17
Time Sent: Friday, Jun 16, 2006 0 9:2 3 A.M.

JUDGEMENT FILED:

JUDGMENT FILED: J u n e 1 6, 2006 UNITED STATES COURT OF APPEALS for the Fourth Circuit No. 05-4493 CR-03-1088-CMC

UNITED STATES OF AMERICA Plaintiff – Appellee

v.

WILLIAM LUTHER STEWART, a/ k / a Luke Stewart Defendant - Appellant

Appeal from the United States District Court for the District of South Carolina at Columbia .....

In accordance with the written opinion of this Court filed this day, the Court affirms the judgment of the District Court.

A certified copy of this judgment will be provided to the District Court upon issuance of the mandate. The judgment will take effect upon issuance of the mandate.

/s/ Patricia S. Connor
CLERK

UNPUBLISHED UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT UNITED STATES OF AMERICA, versus Plaintiff - Appellee, WILLIAM LUTHER STEWART, a/k/a Luke Stewart, Defendant - Appellant. Appeal from the United States District Court for the District of South Carolina, at Columbia. Cameron McGowan Currie, District Judge. (CR-03-1088-CMC) Submitted: May 16, 2006 Decided: June 16, 2006 Before NIEMEYER and KING, Circuit Judges, and HAMILTON, Senior Circuit Judge. Affirmed by unpublished per curiam opinion. James M. Griffin, Columbia, South Carolina, for Appellant. Reginald I. Lloyd, United States Attorney, Dean A. Eichelberger, Assistant United States Attorney, OFFICE OF THE UNITED STATES ATTORNEY, Columbia, South Carolina, for Appellee. Unpublished opinions are not binding precedent in this circuit. See Local Rule 36 (c).

PER CURIAM: William Luther Stewart was convicted of wire fraud, in violation of 18 U.S.C. §1343 and 2, and the district court sentenced him to 30 months' imprisonment. The indictment charged that through a scheme and artifice to defraud, Stewart, together with his colleague, Edwin G. Blair, and their company, Media Fusion, LLC, obtained a loan of $1 million from SCANA Corporation, a company that owns South Carolina Electric and Gas, to fund implementation of a new technology that Stewart had allegedly developed. In particular, Stewart was charged with misrepresenting the fact that he had successfully developed a technology by which to transmit voice, video, and data over the power grid, and, to make his representations credible, with misrepresenting his credentials and his relationships with other major technology companies and institutions, such as MIT, NASA, the Defense Advanced Research Projects Agency, Microsoft, and San Diego Gas and Electric. The indictment

also charged that in furtherance of the scheme, Stewart and Blair sent a fax from Texas to SCANA in South Carolina, which contained projected monthly milestones and a budget for implementation of the technology. The jury found Stewart guilty of the charge, and the district court entered a judgment of conviction and the 30-month sentence on May 6, 2005.

On appeal, Stewart contends (1) that the evidence was insufficient to support the verdict; (2) that the district court abused its discretion in admitting letters from NASA and a U.S. Attorney in Mississippi, confirming, after the loan had already been made to Stewart, the inaccuracy of some of Stewart's misrepresentations; and (3) that the district court erred in $1 million-loss figure when Stewart was acquitted of the specific count charging that his scheme caused the transmission of $1 million from South Carolina to Texas. For the reasons that follow, we affirm.

I

Stewart contends first that the government failed to present evidence sufficient to convict him, arguing that there was no evidence that he created or directed the sending of the fax, that he participated in the misrepresentations, and that the misrepresentations were false. Taking the evidence in a light most favorable to the government, however, we believe that there was substantial evidence to support Stewart's conviction. Even though the fax was sent by Blair, the jury could reasonably have believed that Stewart directed Blair to send the fax or that he assisted Blair in doing so. Stewart and Blair were the two principals of Media Fusion and were constant companions in obtaining the loan from SCANA. The fax furthered the scheme to defraud SCANA because SCANA officials requested the financial information contained in the fax before they made their loan and testified that they would not have loaned

Media Fusion the $1 million if they had known that the technology was not ready for immediate installation. The fax implied that it was developed and ready for installation because the fax minimized future costs for research and development and forecasted revenue-producing consumer use within 12 months of the loan. In addition, the jury could reasonably have agreed with SCANA officials who testified that Stewart constantly led them to believe that the technology was more fully developed than it actually was. The officials stated that Stewart had told them that the technology was "proven technology" capable of near-term commercialization. The evidence showed that in actuality, however, Stewart had never tested the technology on a power line to prove it could pass digital signals through transformers. Even if the jury believed Stewart that he had done some testing, he testified that he had only tested some individual components of the technology, and not the technology as a whole. In light of the testimony that SCANA officials told Stewart they only were interested in ready-to-market technology, the jury could have inferred an intent to defraud from Stewart's repeated misrepresentations. From our review of the record, we conclude that the jury had ample evidence on which to convict Stewart on the § 1343 charge.

II

Stewart also contends that the district court abused its discretion in admitting into evidence a 1999 letter from NASA and a 2000 letter from the Department of Justice because the letters were dated after SCANA had made the $1 million loan to Media Fusion. The government, however, offered the letters to demonstrate that part of the scheme included Blair's misrepresentations about Media Fusion's relationship with NASA made to forestall SCANA from recalling the $1 million loan. We agree that these

letters were relevant evidence of intent to mislead SCANA with the "design[] to lull the victims into a false sense of security [and] postpone their ultimate complaint to the authorities." United States v. Lane, 474 U.S. 438, 451-52 (1986) (quoting United States v. Maze, 414 U.S. 395, 403 (1974)). We disagree with Stewart's contention that the letters were also unduly prejudicial because they contained indirect evidence of matters on Media Fusion's website. The district court agreed with Stewart in noting that the letters' references to information found on a website failed the best evidence rule. The court received them, however, for a limited purpose and not for the substantive evidence of the content of Media Fusion's website, and in order to be sure that the documents were received for that limited purpose, the district court gave the jury a limiting instruction. In these circumstances, we do not believe that the district court abused its discretion.

III

Finally, Stewart contends that the district court erred in calculating the amount of loss in determining his sentencing guidelines range. Finding that SCANA's $1 million loan was "the value of the money, property, or services unlawfully taken," U.S.S.G. § 2Fl.l App. Note 8 (Nov. 1998). the district court increased Stewart's offense level 11 levels, resulting in a sentencing guideline range of 30-37 months' imprisonment. Stewart argues that because he was not convicted of Count which charged him with wire fraud for SCANA's $1 million loan, the court could not consider the amount of the loan as relevant conduct. The jury's acquittal, however, was based on a failure of proof under a standard of beyond-a-reasonable-doubt, and in sentencing, the district court need only have found the loss of the $1 million by a preponderance of the evidence. Accordingly, in determining the appropriate sentencing

guideline, the court was entitled to consider acquitted conduct as relevant conduct. See United States v. Watts, 519 U.S. 148/ 157 (1997). Moreover, the evidence supported the finding that $1 million was the proper amount of loss. Application Note 8 to U.S.S.G.§ 2Fl.l (Nov. 1998) explains that in determining the loss, the court should consider the commentary to U.S.S.G. § 2B1.l, which provides that "Where the offense involved making a fraudulent loan or . . . other unlawful conduct involving a loan . . . the loss is to be determined under the principles set forth in the commentary to section 2Fl.l," U.S.S.G. § 2Bl.l App. Note 2 (Nov. 1998). The commentary to § 2Fl.l describes how the nominal loss - - in this case the amount of the loan - - can overstate the actual loss when the defendant has repaid some of the loan or collateralized it with property that is not worthless. See U.S.S.G. § 2Fl.l App. Note 8 ("If a defendant fraudulently obtains a loan by misrepresenting the value of his assets, the loss is the amount of the loan not repaid at the time the offense is discovered, reduced by the amount the lending institution has recovered (or can expect to recover) from any assets pledged to secure the loan"). The district court, however, concluded that there were no such offsets because as of sentencing the loan remained uncollected and because Media Fusion had provided no collateral.

Stewart argues that SCANA was effectively a "'strategic' partner" with Media Fusion and thus recovered some value from the loan because SCANA put the money to use in the common enterprise "in an attempt to commercialize defendant's technology." The district court, however, reasonably found that SCANA received no offsetting value from these efforts. The technology never became commercially viable and never provided any benefit to SCANA.

Because there was no repayment of the loan, no collateral to secure its repayment, or no other expectancy to

reduce its outstanding amount, the district court did not clearly err in finding for sentencing that the loss was $1 million.

* * *

Accordingly, we affirm the judgment of the district court. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court) and argument would not aid in the decisional process.

AFFIRMED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FILED
JULY 11, 2006

No. 05-4493
CR-03-1088-CMC

UNITED STATES OF AMERICA

Plaintiff – Appellee

v.

WILLIAM LUTHER STEWART,
a/k/a Luke Stewart

Defendant - Appellant

ORDER

Appellant has filed a petition for rehearing. The Court denies the petition for rehearing. Entered for a panel composed of Judge Niemeyer, Judge King, and Senior Judge Hamilton

For the Court,

/s/ Patricia S. Connor

Clerk